Supreme Court of the United States

October Term, 1950

No. 310

CALIFORNIA STATE AUTOMOBILE ASSOCIATION, INTER-INSURANCE BUREAU,
Appellant,

against

WALLACE K. DOWNEY, Insurance Commissioner of the State of California,
Appellee.

APPLICATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF STATE OF NEW YORK

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Now comes the State of New York, by its Attorney General, and respectfully begs leave of the Court to submit the subjoined brief as *amicus curiae* upon the above-entitled appeal.

BRIEF FOR THE STATE OF NEW YORK AS AMICUS CURIAE

Statement

This case presents the issue of the constitutional validity of a California statute and of the plan promulgated pursuant thereto for apportionment among and assignment to insurers authorized to transact motor vehicle liability insurance of applicants entitled in good faith to such

coverage but unable to procure it by ordinary means. Such assigned risk plan is particularly assailed in its application to a reciprocal inter-insurance bureau which individually confines its operations to members of an automobile association.

The Interest of the State of New York

The New York Insurance Law contains in Section 63 the following provision:

> "§ 63. Assigned risk plans
> "The superintendent shall, after consultation with the insurers licensed to write motor vehicle liability insurance in this state, approve a reasonable plan or plans for the equitable apportionment among such insurers of applicants for such insurance who are in good faith entitled to but are unable to procure insurance through ordinary methods and, when such plan has been approved, all such insurers shall subscribe thereto and shall participate therein. Any applicant for such insurance, any person insured under such plan and any insurer affected may appeal to the superintendent from any ruling or decision of the manager or committee designated to operate such plan. All orders of the superintendent shall be subject to judicial review as provided in section thirty-three of this chapter. Added L. 1946, c. 467, eff. July 1, 1946."

In 1929 (Chapter 695) a new Article 6-A, entitled "Financial Responsibility for Operation of Motor Vehicles," had been added to the Vehicle and Traffic Law. Because of the constantly increasing use of motor vehicles and the attendant danger to the public, privately operated cars were subjected to a measure of the same regulation as those operated for hire. Compulsory proof of financial responsibility was not required until, after an accident, a judgment for damages remained unsatisfied. Thereafter, proof of ability to respond in damages was required in order to obtain restoration of operators' licenses and registrations suspended in

accordance with the statute (§ 94-b). No license or registration could be suspended, however, where an insurance policy or bond under Section 17 was in effect or where the owner was insured by a policy against liability for personal injury and property damage within given limits. This was sustained as reasonable enforcement of a proper public policy (*Reitz* v. *Mealey*, 314 U. S. 33).

In 1940 the question of enacting a compulsory automobile insurance law was raised because of general agreement that some further measure was necessary. Ultimately a less drastic bill was introduced in 1941. At that time the question of whether provision for an assigned risk bureau should be included was raised but was omitted on assurance that a voluntary assigned risk bureau would be put in operation (Report of Joint Legislative Committee on Recodification of the Insurance Law, Leg. Doc. [1941] No. 73, pp. 5, 6).

The new bill was signed by the Governor on April 2, 1941 (L. 1941, c. 872), and New York was "committed to a trial" of a safety responsibility law rather than compulsory insurance. An assigned risk plan had meanwhile been put in operation (Report of the Joint Legislative Committee on Revision of the Insurance Law, Leg. Doc. [1942] No. 68, pp. 51, 52).

The new Article 6-A of the Vehicle and Traffic Law, enacted by Chapter 872 of the Laws of 1941, generally revised the former financial responsibility provisions and adapted them to the needs revealed by experience in their administration. Under Section 94-c thereof, as amended, suspension of the license of any person operating and of the registration of any person owning a motor vehicle in any manner involved in an accident resulting in injury or death, or property damage in excess of $50.00, is required unless and until sufficient security to satisfy any resulting

judgment and proof of further financial responsibility is furnished by such operator or owner, or both. This section, however, is not applicable to any owner or operator if the owner at the time of the accident had in effect with respect to the motor vehicle an insurance policy covering possible liability within limits fixed by the statute, nor is it applicable to an operator not the owner if there was in effect a policy covering his operation of vehicles not owned by him. It is still only following an accident that proof of responsibility, by an insurance policy or otherwise, is compulsory in order to retain the privilege of operating or having registered a private motor vehicle, but the statute still precludes any interference with the privileges of one who already had in effect a satisfactory liability policy or with motor vehicles required to be insured under Section 17 (§§ 94-e and 94-ff).

The statutory requirement for an assigned risk plan was specifically enacted in 1946 pursuant to recommendation of the Superintendent of Insurance in his Eighty-Seventh Annual Report (Leg. Doc. [1946] No. 73, p. 57-a) as "an essential part of any comprehensive financial responsibility plan" and to overcome the shortcomings of the voluntary plan arising from the lack of legal sanction.

Like California's, the New York Plan was necessitated by laws implementing the public policy of the State to require security for the responsibility of those operating motor vehicles. Also like California's, it was adopted only after trial of a voluntary plan when the need for express legislative sanction became apparent. The New York Plan has been in successful operation without question of its validity. It forms a necessary mechanism incident to the Safety Responsibility Law which is now imbedded in the public policy of the State. The State is vitally concerned that the responsibility of authorized insurers thus to contribute

to their function of spreading and minimizing risk shall not be cast in doubt.

It is apparent that financial responsibility provisions like those of California and New York tend to induce many more persons to procure insurance even in advance of accident than would otherwise do so. It is an inescapable consequence that the base for distribution of the actual risk has been greatly broadened and the total business has been increased. The Assigned Risk Plan merely compels those who have sought the privilege of doing business in this field of insurance to accept, on the basis of a fair apportionment, the burdens as well as the benefits accruing to insurers from an enforcement of a valid public policy which induces and compels the procurement of insurance as proof of financial responsibility.

ARGUMENT

A state may validly require insurers as a condition of continuing authority to do business to subscribe to a plan for the equitable apportionment of risks of the kind required by its motor vehicle financial responsibility law.

Long before *Nebbia* v. *New York*, 291 U. S. 502, discarded artificial restraints, implicit in the phrase "businesses affected with a public interest", upon State power to make regulations bearing upon property and contract rights in the conduct of business, this Court had recognized the peculiar and extended scope of State authority with respect to the business of insurance. In *German Alliance Insurance Co.* v. *Kansas*, 233 U. S. 389, legislative regulation of insurance rates was upheld against the contention that the business of insurance was so far a private right that it "cannot be compelled nor can any of its exercises be compelled".

The Court recognized that the business was done through personal contracts of indemnity but found their effects to extend so far beyond the concerns of the immediate parties as to impose upon the business a public concern invoking public regulation. It was denied that the right to engage in the business was a natural one and recognized that it could be denied to individuals while permitted to corporations. The extent of the regulations which could be imposed were said to deny it the character and privilege of "a private business" (233 U. S., at p. 416).

In expounding its thesis, the Court said:

> "The effect of insurance—indeed, it has been said to be its fundamental object—is to distribute the loss over as wide an area as possible. In other words, the loss is spread over the country, the disaster to an individual is shared by many, the disaster to a community shared by other communities; great catastrophes are thereby lessened, and, it may be, repaired. In assimilation of insurance to a tax, the companies have been said to be the mere machinery by which the inevitable losses by fire are distributed so as to fall as lightly as possible on the public at large, the body of the insured, not the companies, paying the tax. Their efficiency, therefore, and solvency are of great concern. The other objects, direct and indirect, of insurance we need not mention. Indeed, it may be enough to say, without stating other effects of insurance, that a large part of the country's wealth, subject to uncertainty of loss through fire, is protected by insurance. This demonstrates the interest of the public in it and we need not dispute with the economist that this is the result of the 'substitution of certain for uncertain loss' or the diffusion of positive loss over a large group of persons, as we have already said to be certainly one of its effects. We can see, therefore, how it has come to be considered a matter of public concern to regulate it, and, governmental insurance has its advocates and even examples. Contracts of insurance, therefore, have greater public consequence than contracts between individuals to do or not to do a particular thing whose effect stops with the

individuals. We may say in passing that when the effect goes beyond that, there are many examples of regulation. *Holden* v. *Hardy*, 169 U. S. 366; *Griffith* v. *Connecticut*, 218 U. S. 563; *Muller* v. *Oregon*, 208 U. S. 412; *Mutual Loan Co.* v. *Martell*, 222 U. S. 225; *Schmidinger* v. *Chicago*, 226 U. S 578; *Chicago, Burlington & Quincy R. R. Co.* v. *McGuire*, 219 U. S. 549; *Noble State Bank* v. *Haskell*, 219 U. S. 104." (p. 412)

Again it said with particular reference to the importance of insurance to the insured:

> "The contracts of insurance may be said to be interdependent. They cannot be regarded singly, or isolatedly, and the effect of their relation is to create a fund of assurance and credit, the companies becoming the depositories of the money of the insured, possessing great power thereby and charged with great responsibility. How necessary their solvency is, is manifest. On the other hand to the insured, insurance is an asset, a basis of credit. It is practically a necessity to business activity and enterprise. It is, therefore, essentially different from ordinary commercial transactions, and, as we have seen, according to the sense of the world from the earliest times—certainly the sense of the modern world—is of the greatest public concern." (pp. 414-415)

(See also, *United States* v. *Southeastern Underwriters*, 322 U. S. 533, 540.)

It was for the purpose of making insurance available to those who might otherwise be prevented from obtaining it that the Kansas statute involved in the *German Alliance* case was upheld. The Court said:

> "It is in the alternative presented of accepting the rates of the companies or refraining from insurance, business necessity impelling if not compelling it, that we may discover the inducement of the Kansas statute, and the problem presented is whether the legislature could regard it of as much moment to the public that they who seek insurance should no more be constrained by arbitrary terms than they who seek transportation

by railroads, steam or street, or by coaches whose itinerary may be only a few city blocks, or who seek the use of grain elevators, or be secured in a night's accommodation at a wayside inn, or in the weight of a five-cent loaf of bread. We do not say this to belittle such rights or to exaggerate the effect of insurance, but to exhibit the principle which exists in all and brings all under the same governmental power." (p. 417)

It is established, we submit, that the business of insurance is inherently of such intimate concern to the public that those who seek the privilege of engaging in it subject themselves to the greatest degree of public control in order that the protection which is its basic purpose may be obtained.

As part of its concededly valid policy relating to financial responsibility of motor vehicle operators, the State has accepted insurance as proof thereof. It has induced many persons and compelled many others to furnish such proof. In doing so it has greatly increased the demand for the protection which insurance is designed to give and spread the risk over a proportionately larger part of the public which ultimately pays the cost through rates subject to adjustment at the behest of the insurers. Normally, insurers seek those risks least likely to cause loss but if there were no risk, there would be no need for insurance. If those impelled or compelled by law to seek insurance cannot obtain it, the public function of insurers to divide and spread loss would not be fulfilled. If those risks not willingly accepted cannot be fairly apportioned among all insurers, the incidence of the risk will bear on some to the unfair advantage of others.

Insurers do not engage in that business as a matter of common right. They may do so only with the permission of the State and subject to public control. The regulation of such an activity includes power to impose conditions

which might not otherwise be admissible (*Packard* v. *Banton*, 264 U. S. 140, 145). Assigned risk plans of the kind here involved are a method for distribution on a fair and impartial basis of a part of the public responsibility imposed upon those who have sought the license of the State and taken it subject to the power of the State.

Hoopeston Canning Co. v. *Cullen*, 318 U. S. 313, establishes that reciprocal insurers do not remove themselves from the jurisdiction or power of a state by the technical peculiarities of their method of furnishing insurance protection. Neither, we submit, can that result follow from voluntary limitations upon the scope of the business which such an insurer wishes to do. The authority sought and obtained is not based on such limitations and they cannot be invoked to give one insurer an advantage over others having the authority to write the same kind of coverage.

It is respectfully submitted that assigned risk plans of the kind involved in this appeal should be held to be in all respects valid and constitutional.

Dated, March 1, 1951.

Respectfully submitted,

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